

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO,
CLC and its LOCAL 53G

and

Case 06-CB-198329

WORLD KITCHEN, LLC

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO,
CLC and its LOCAL 53G

and

Case 06-CB-199021

WORLD KITCHEN, LLC

**POST HEARING BRIEF OF UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 53G¹, AFL-CIO, CLC**

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¹ USW Local 53G

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF FACTS.....	1
Introduction and Procedural History.....	1
The Tentative Agreement and Ratification Vote.....	3
Communications After Ratification Vote.....	8
History Leading to Current issues: Ratification Requirements.....	11
ARGUMENT.....	14
I. The Labor Agreement Is a Three Party Agreement. Ratification Is Required for a Final Agreement and USW Local 53G Did Not Ratify the Tentative Agreement.....	14
II. The USW International Did not Have the Authority to Bind USW Local 53G to a Labor Agreement without Proper Ratification.	17
III. The Company Demands That the USW International and USW Local 53G Sign a Contract Document That Fails to Contain the Entire Agreement of the Parties.....	19
CONCLUSION.....	20
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allegheny Aggregates Inc.</i> , 311 NLRB 1165 (1993)	19
<i>Joe Carroll Orchestras and Entertainment Agency Inc., et al.</i> , 254 NLRB No. 153 Ftns Nos. 1 and 2 (1981)	16
<i>Kelly's Private Car Service</i> , 289 NLRB 30, 39-40 (1988)	21
<i>Martin Barry Co.</i> , 241 NLRB 1011, 1013 (1979)	16
<i>New Process Steel</i> , 353 NLRB Mo. 13 p. 114 (2008)	16
<i>North County Motors Limited</i> , 146 NLRB 671, 674 (1964)	15
<i>Pan Oston Co.</i> , 335 NLRB 305, 306 (2001)	19
<i>Polycon Indus. Inc.</i> , 361 NLRB No. 31, slip op at 7 (2015)	21
<i>Service Employees Local 87 (W. Bay Maintenance)</i> , 291 NLRB 82, 83 (1988)	19
<i>Wometco-Lathrop Co.</i> , 225 NLRB 686, 688 (1976)	20

STATEMENT OF FACTS

Introduction and Procedural History

World Kitchen is a manufacturing facility located in Charleroi, Pennsylvania making specialty glass products, such as Pyrex. The former owner of the facility was Corning Glass. (T. 169)¹. The collective bargaining representative(s) at the facility are the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (ABG Division) and its Local Union 53 G². There are and have been three parties to the collective bargaining agreement(s) at this facility, World Kitchen, USW International, and USW Local Union 53 G. (GC Ex. 2) In particular see Joint Exhibit No.1 containing stipulations as to the three party nature of the collective bargaining agreements since the year 2000.

In 2016-2017 a dispute arose between the unions and the company over whether or not a tentative successor collective bargaining agreement had been

¹ The designation T. followed by a number indicates the page of the hearing transcript where the referenced testimony appears. Exhibits will be referred to by with a designation followed by an exhibit number. The designations are GC (General Counsel), Jt. (Joint), RI (Respondent International Union) and RL (Respondent Local Union)

² Hereinafter referred to as USW International and USW Local 53 G respectively. Where applicable they may be referred to as the Unions.

properly ratified. Charges were filed by World Kitchen in May, 2017 alleging bad faith bargaining by Respondent unions in violation of Section 8(b)(3) of the Act. The Regional Director issued a Complaint charging violations of the Act as alleged by World Kitchen. Specifically the Complaint alleged that on “about November 3, 2016 the Employer and Respondent reached complete agreement on terms and conditions of employment of the Unit to be incorporated in a collective bargaining agreement” and that “---- respondent has failed and refused to execute the agreement.” Complaint paragraphs 8(a) and (c).

Respondent Unions filed an Answer to the Consolidated Complaint and Affirmative Defenses denying liability and explicitly denying that Respondent Unions have failed and refused to bargain collectively in violation of Section 8(b)(3) of the Act. Specifically, the Respondent Unions stated “The Employer and Respondents did not reach a complete agreement on November 3, 2016 as Respondent Local 53G, a necessary party to any agreement did not ratify the tentatively reached agreement, a necessary precondition to entering an agreement.” Answer to Consolidated Complaint, Affirmative Defenses, par. 3.

Shortly prior to the hearing, undersigned counsel entered his appearance as counsel for Respondent USW Local 53G. The matter proceeded to hearing in Pittsburgh, Pennsylvania on February 5, 2018. This post hearing brief follows.

The Tentative Agreement and the Ratification Vote

Andrew Goldberg is legal counsel who represented World Kitchen in contract negotiations with the USW and USW Local 53 G in 2016 and was the principal witness for the General Counsel at the hearing. (T.23) Among those present for the company during that bargaining were John Lackovic, Jon Hartman, and Donald Good. (T.24) Jim Watt was the principal representative for the International Union. Among those present for USW Local 53 G was Tom Seal, the Local Union President and Heather Price. (T.25-27)

Goldberg testified that the parties to the tentative agreements were World Kitchen, the USW International Union, and USW Local 53G. The original expiration date for the contract was spring of 2016, but it was extended twice, once in April and again in September. 2016. On November 2, 2016 the parties reached tentative agreements on all contract terms and signed a Tentative Agreement (T.28-29, G.C. Exhibit2)

The parties met on November 3 to prepare a contract summary that would be presented to the employees for a ratification vote. Goldberg indicated that when a tentative agreement was reached with some union representatives in June of 2016 it had not been presented to the membership for a ratification vote.

Goldberg testified that there is “nothing in the contract about ratification” and that there is “no document that requires ratification” (T.36-39) Unfortunately, Mr. Goldberg’s recollection does not necessarily match many of the documents in this case, including many he prepared.

The tentative agreement signed off on November 2, 2016 is replete with the language on most of the separate articles and pages of the contract, by the signature lines for each article, stating “Tentatively agreed to September 29, 2016)”³ That language also is present in the Pension Agreement. (GC Ex. 2) In a tentative agreement previously reached in the August time frame, Goldberg sent an e mail dated August 3, 2016 referencing a tentative agreement. (RI Ex. 1) On August 12, 2016 Goldberg sends another email expressing concern over a mailer, stating “I thought the objective was to have the contract ratified. We are of concern that your document will serve the opposite purpose.” (RI Ex 2). On an e mail dated October 5, 2016 Goldberg references the need to “finalize and ratify”. (RI Ex.4) Again on January 26, 2017, Goldberg references in an e mail that “In return for the ratified CBA, we made promises on capital projects for the plant.” (RI Ex. 5)

³ The parties all recognized that the particular date on those pages was incorrect.

Goldberg testified that Jim Watt or John Ratica of the USW International Union told him that the local union ratification vote held on November 10, 2016 resulted in a tie, that the USW International considered that ratification, and that they had a contract. (T.39) Donald Good the Senior HR Manager at World Kitchen was present at every negotiation session. The day of the ratification vote he received a call from Heather Price and a voice mail message from USW International representative Jim Watt. Both said there was a tie vote and there was a contract. (T.108-111)

Good testified that he dealt with USW Local President Tom Seal on ratification issues and acknowledges that Seal asked him for permission to use a Company building for the ratification vote. He remembers that the Local Union President Seal later told him that there was a problem with the ratification vote, that a tie vote does not constitute ratification. (T.117-118)

Tom Seal is a melting operator for World Kitchen and also has served as the USW 53 G President since May of 2015. The collective bargaining agreement has always been a tri-party agreement. The international representative in bargaining, Jim Watt, serves as the chief spokesperson at the bargaining table, but the USW International and USW Local 53G work together. (T.169-172)

A tentative agreement was reached on November 2, 2016. (GC Ex. 2)

Following that, a summary of the proposed contract terms was prepared for presentation to the membership (T.174-175, RL Ex. 5). Tom Seal explained the ratification procedure, once the tentative agreement is reached, which is at the heart of the dispute here. Local Union ratification requires three steps which were followed here. These consist of:

1. Notices to the membership: These were posted in the plant notifying the members of three different times for explanation meetings on the proposed tentative agreement. These were posted on the union bulletin boards and at the time clocks in the plant, and are visible to both union members and management. (RL Ex. 6)

2. Membership explanation meetings: Three of these were held for the members over a two day period. (T.179) The cover page of the summary document signed by the Local 53 G negotiating committee presented to the membership at these meetings states in relevant part, “—although it is not the contract we had hoped for, we believe it is the best deal we could get.” (RL Ex. 5)

3. A secret ballot ratification vote by the membership. Prior to the vote notices were posted informing members of the time and place of the ratification vote, November 10, 2016. These were posted on union bulletin boards and also at time clocks where they are visible to both union membership and plant management. (T.175-176, RL Ex. 7). The posted notices specifically stated: "The voting by the membership will be to accept or reject the Tentative Agreement on a successor contract." Seal also talked Senior HR Manager Donald Good about reserving the company credit union building for a ratification vote. At that time Good told Seal that he hoped the contract would pass. (T.179)

The Local Union held a secret ballot vote from 5 AM to 5 PM on November 10, 2016. The voting on whether to ratify the tentative contract was by way of a secret ballot. (T.179-180) Local Union President Seal was present from 5 AM until about 3:30 or 4 PM on the day of the ratification vote, after which he had to leave prior to the counting of the secret ballot votes. Another member of the Local Union bargaining committee, Heather Price, called Seal later after ballots were counted and said it was a tie vote. She also told Seal that International Representative Jim Watt told her they had a contract. (T.180-181) Seal received a call from Company representative Jon Hartman on November 12. Seal told

Hartman that there was a problem, there would probably be a need to revote, and that there was no ratified agreement. He did not specifically mention the tie vote at that time. (T.182)

Seal worked at the plant on November 14 and told John Lackovic that the contract was not ratified because it was a tie vote. He spoke to Don Good on November 16 telling him that it was a tie vote and would need to be revoted. Senior HR Manager Good remembers that conversation, though not the specific day, but does remember being told there was a problem with the vote, that a tie vote is not ratification. Seal also stated that Heather Price was not authorized to speak for the Local Union, as she was just an observer at the ratification vote. At this point Seal was not aware of any calls from the International Union to the company. (T.183-185)

Communications Following Ratification Vote

Andy Goldberg testified that Jim Watt or John Ratica told him that the ratification vote was a tie and that the USW International considered that ratification and that they had a contract. He conveyed that to the bargaining team

at World Kitchen. (T.39-40) When USW Local 53 G President Tom Seal indicated he planned to hold a second ratification vote on December 1, Goldberg asked USW Representative John Ratica to direct Seal not to hold a second vote because they had a contract. He testified that Ratica assured him the international Union would sign the contract. (T.43, 49) Goldberg testified that he spoke to Jim Watt on December 20 and was told that the international Union was placing the local Union under an Administratorship and would sign the contract for the Local Union. (T.55)

James Watt is a USW International Staff representative and was the chief negotiator on the union side during the World Kitchen negotiations. (T.119-120) He was present for the secret ballot rank and file ratification vote on November 10, 2016. He was involved in counting the votes, which turned out to be a tie. (T.122-123)

Watt was not sure of the implications of a tie vote and immediately called District Director Bob McAuliffe. McAuliffe said he would get back to him (T.125) After receiving the call from Watt, McAuliffe called Bob Roots at international

headquarters who is director of OBM Services. Roots has the responsibility for interpreting the constitution and local union by laws. (T.208)

McAuliffe asked Root what happens when there is a tie vote for contract ratification. Roots stated that a tie vote is not a rejection, it is a ratification. However, McAuliffe did not tell Roots two things, that this was a tri party contract and that this was a G local, i.e. a glass local. After Roots told him that a tie vote was ratification, McAuliffe called James Watt and said that there was a contract. (T.208-209)

In the same time frame Local Union President Tom Seal took several steps to make it clear, if there has been any doubt, the USW local 53 G did not consider the tentative contract to have been ratified. When the Company posted a notice to the membership about the “contract” Seal immediately responded to company representatives stating,

“Local 53G still maintains the contract has not been ratified by a majority of the membership. To remedy this a revote must occur, as we still maintain a triparty collective bargaining agreement as per the merger agreement” (RL Ex. No. 9)

Seal posted a similar notice in the plant that the membership could see and read. (RL Ex. No. 10) Local Union President Seal also refused to sign the Company notice of the January 2017 wage increase based on the Local Union's consistent position that the tentative agreed to contract (GC Ex. No. 2) had never been ratified by the membership. (RL Ex. No. 11)

District Director McAuliffe, when asked at the hearing why the USW International had not signed the contract, stated because it is a tri party contract. John Ratica later, in January 2017, told Goldberg that Leo Gerard told him not to sign the contract. (T.90)

The History That Led to the Current Issues: Ratification Requirements

Phil Ornot, now retired, used to work at the Charleroi facility. Ornot principally described the operation of the local union in the plant and the history of mergers of different union over a long period of time as well as the significance of some of the merger provisions between the different unions.

When Ornot started work in the plant in 1969 employees were represented by the United Glass and Ceramic Workers. (T.143) At that time (and currently)

there was an Industrial Relations Committee, the IRC. Each of the three areas of the plant had an IRC representative who was on the bargaining committee for the negotiation of collective bargaining agreements. Ornot was an IRC representative and served in a number of offices of the local Union, including serving as its president from the late 1980's until 1993. (T 145).

In 1992 the United Glass and Ceramic Workers merged with the Aluminum Brick, and Clay International Union ("ABC"). That merger agreement preserved the United Glass and Ceramic Workers method of contract operation.(RL Ex. 1, Section 20) That method required notice, explanation meetings, and a secret ballot vote. (T.146-147) Indeed, the 1993 ABG⁴ Constitution provides in Article XV that "—agreements shall be subject to membership ratification."(RL Ex. 2, p.36)

Ornot became a staff representative for the ABG International Union in 1993 which merged with the USW International in 1996-1997. The merger agreement with the USW preserves ratification procedures from the ABG Constitution. More specifically the USWA-ABG Merger Agreement states in Article IV Section B(3) that the "procedure for ratification of agreements with employers

⁴ Aluminum Brick and Glass Workers.

shall be in accordance with and governed by the procedures incorporated in Article XV of the ABG Constitution”, quoted in the preceding paragraph (RL Ex. 3, p.5) That merger agreement also preserves the previously quoted Section 20 of the merger agreement between the ABC and United Glass and Brick Workers. (RL Ex. 2, Attachment 2). Contract ratification continued to require a majority vote (of those who voted) for the contract (T. 150-153).

For example, this situation has occurred at this plant before. Shortly after the merger between the United Glass and Ceramic Workers and the Aluminum Brick and Clay International Union in 1992 there was a tie ratification vote. The union told the company that the contract did not pass and there was a need to continue to negotiate and the parties did so. (T.153-154)

Moreover, the USW International union cannot sign off on a contract for a glass local union without a ratification vote. This is one of the old glass local unions. Ornot explained that to USW District Director Bob McAuliffe when he called Ornot in late December 2016 about the significance of a tie vote for a glass local union. Ornot explained two related concepts. First, this collective bargaining agreement is a tri-party contract that each of the parties have to sign. Second,

this is one of the old glass locals and a tie vote by local union membership does not mean the tentative contract was ratified. (T.154-155)

ARGUMENT

I. The Labor Agreement Is a Three Party Agreement. Ratification Is Required For a Final Agreement and USW 53G Did Not Ratify the Tentative Agreement

The General Counsel and the company presented evidence that there is nothing in the “contract” that requires ratification. As a general principle it is true that nothing in the National Labor Relations Act imposes an obligation on the statutory bargaining agents of a union to obtain ratification by employees in the bargaining unit before a final and binding agreement occurs. *North Country Motors Limited*, 146 NLRB 671,674(1964)

However, that misses the point. Absent bad faith, parties in bargaining for a collective bargaining agreement may lawfully limit the authority of its negotiators

to bargaining only. However, members of a union have the right to determine the extent of authority delegated to a bargaining unit. "It is within their province to determine whether or not their bargaining unit may enter into a binding contract with or without membership ratification. *"Joe Carroll Orchestras and Entertainment Agency Inc. et.al 254 NLRB No. 153 Ftns Nos 1 and 2 (1981)* Unless a union and an employer have agreed otherwise, "ratification is an internal union matter which is not subject to question by an employer." *Martin Barry Co. 241 NLRB 1011,1013(1979) New Process Steel, 353 NLRB Mo. 13 p. 114(2008).*

The tentative labor agreement was a three party agreement. (GC Ex. 2) Since at least the year 2000 three parties have signed the labor agreement, the company, the USW International, and USW Local 53 G. (Joint Ex. No.1) Phil Ornot testified to the history of the requirement of local union membership contract ratification that was preserved through a history of mergers of several unions, culminating in a merger into the USW International. (RL Ex. 1,2, and 3)

The Company was well aware of this, and in fact agreed with it, through a series of documents. Prior to the November 10, 2016 ratification vote there had been two prior membership votes where the tentative contract had been

rejected. (T. 195-196) On August 3, 2016 Goldberg himself expressed concern of a contract summary to be presented to the membership stating, in relevant part, "I thought the objective was to have the contract ratified. We are of concern that your document will have the opposite purpose." (RI Ex. 2) On October 5, 2016 Goldberg mentioned the need to "finalize and ratify". (RI Ex. 4) The documents prepared on November 2, 2016 were tentative agreement. (GC Ex. 2)

Moreover, USW Local 53 G President Seal requested permission from the company to use a company building for the ratification vote, and in posted notices at the plant made clear to both the members and plant management that there would be explanation meetings and a vote on whether or not to accept or reject the tentative contract. (RL Ex. 5,6,and 7) In this the time frame between November 2, 2016 and November 10, 2016 no one from the company sought to contend that a Local Union ratification vote was not required. Indeed, Good stated to USW Local 53G President Tom Seal that he hoped the contract passed.

II. The International Union Did Not Have the Authority to Bind USW Local 53G to a Labor Agreement Without Proper Ratification.

There is no dispute in the record of this case that on several occasions, orally and in writing, James Watt and other representatives of the USW International, told the Company that it considered the tie ratification vote of USW Local 53G to be contract ratification. There is also no dispute the USW local 53G, and specifically Local Union President Tom Seal, early and often , stated orally and in writing to company representatives, that a tie vote is not considered to be contract ratification. These included conversations with Hartman on November 12 , Lackovic on November 14, and Good on November 16, . (T. 182-185) This also involved written communications to the company and posted notices at the plant for all to see and a refusal to assign off on a document concerning wage increases in the “implemented” contract. (RL Ex. 9, 10, and 11)

The first principal problem here is that the collective bargaining agreement is a three party contract and has been that since at least the year 2000. (Joint Ex. No.1) Each party signs independently, World Kitchen, the USW International, and USW local 53G. This is not a contract where the USW international signs on behalf of USW Local 53 G.

Second, the USW International is not an agent of USW Local 53 G for purposes of contract ratification and signing. Nothing in the documents indicates that the USW International signs as an agent of USW Local 53 G (Joint Exhibit 1, GC Ex. 2) To determine whether the USW International is an agent with the apparent authority to take action on behalf of USW local 53G the Board has historically applied common law principles of agency. The burden of proof on that issue rests with the general counsel as the party asserting the agency relationship. *Alleghany Aggregates Inc* 311 NLRB 1165(1993) and *Pan Oston Co*, 335 NLRB 305, 306 (2001) Two prongs to establishing the existence apparent authority, first, a manifestation by the principal to a third party and, second, that the third party believes that the extent of authority granted to the agent covers the contemplated activity. *Service Employees Local 87 (W.Bay Maintenance)* 291 NLRB 82,83 (1988)

As to the first prong USW Local 53 G never manifested to World Kitchen the USW International had the authority to determine ratification procedures for the local union and including whether the tentative contract was ratified by a tie membership vote. Indeed, on the second prong World Kitchen understood the need for USW Local 53G to sign the contracts, and was well aware of the ratification process. The conversations that USW Local 53G President Seal had

with plant management stating there was no contract, all occurred within 6 days of the ratification vote. This is far less time than what had occurred in *Wometco-Lathrop Co.* 225 NLRB 686,688 (1976) where the Board found that an employer had not ratified unauthorized acts of employer managers because the company president told union representatives within 19 days that the acts were not authorized.

The fact that the process here was messy, as bargaining sometimes is, does not change the analysis in the cases or the proper result, a finding that USW local 53G did not violate the Act.

III. The Company Demands the USW International and USW local 53G Sign a Contract Document that Fails to Contain the Entire Agreement of the Parties.

During the course of bargaining there were discussions concerning potential capital projects for the Charleroi facility. (See RL Ex. No. 4) Indeed, USW Local 53G President specifically stated to the bargaining unit members that they would get the capital improvements, i.e. the decorating line, if they ratified the contract. (T.193) Chief spokesperson for the Company, Andrew Goldberg returned to that issue in an email to USW District Director Robert McAuliffe, dated January 26, 2017. In that email Goldberg specifically stated:

“In return for the ratified CBA, we made promises on capital projects for the plant. These projects included a tank rebuild and a decorating machine. The Board meets on January 31. Part of that meeting will be a vote on whether to approve those projects. We are prepared to keep our promise but we need the USW to do the same.”

These promises were not contained in either the tentative agreements (GC Ex. No 2) or the document(s) that Goldberg demanded that the USW International and USW Local 53G sign . (GC Ex. No. 10)

The General Counsel bears the burden, which it has not met on the record of this case, of showing “-----that the document which the respondent refused to execute accurately reflected that agreement. *Polycon Indus. Inc* 361 NLRB No. 31, slip op at 7(2015) Also see *Kelly’s Private Car Service*, 289 NLRB 30, 39-40 (1988)

CONCLUSION

For all the reasons that appear in this brief of Respondent USW Local 53 G, and for such other reasons as appear in the record of this case, it is respectfully requested that the Complaint issued against USW local 53G be dismissed.

Respectfully Submitted

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